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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
A. On the Discrimination Question	3
B. On the Due Process Question	7
C. Proceedings Before the Court of Appeals	9
Reasons for Allowance of the Writ	9
I. The Court of Appeals Has Decided an Important Question of Federal Statutory Law Which Has Not Been, But Should Be, Settled by This Court	10
A. This Case Presents the First Judicial Review of Section 202(a) of the Communications Act of 1934, and Its Applicability to Competitive Rate-Making	10
B. The Court of Appeals Has Too Narrowly Construed Section 202(a) Without Regard to Statutory Context	10
C. The Court of Appeals' Interpretation is in Conflict With Decisions of This Court Interpreting Comparable Provisions of the Parent Interstate Commerce Act and Other Similar Acts	13
D. In Striking Down Certain Rates as Discriminatory, Although Only in Theory, the Commission Creates a Greater Real Discrimination, to the Short Range Benefit Only of AT&T and a Less Efficient Competitor	15
E. The Court of Appeals' Decision Would Impose a Severe Burden Upon Users of Bulk Communications, and Inhibit National Economic Growth Attributable to the Greater Reliance Upon Communications Services	17

Page

II. The Court of Appeals Erred in Failing to Recognize That the Federal Communications Commission's Unique Procedures Are in Conflict with Decisions of This Court Applying Principles of Constitutional Due Process 20

A. The Commission's Purported Justification of Its Procedures as "Legislative" Action Is Insufficient 26

B. The Commission's Procedures Cannot Be Justified by the Administrative Procedure Act 27

C. The Commission's Procedures Are Unique Among Federal Rate-Making Agencies, and Have Been Uniformly Criticized By Leading Authorities 30

Conclusion 33

Appendix A—Opinion of the Court of Appeals 1a

Appendix B—Judgment of the Court of Appeals 26a

Appendix C—Constitutional and Statutory Provisions Involved 26a

Appendix D—Aeronautical Radio, Inc., TELPAK Services in Use or on Order, July, 1962 (J.A. 299) 35a

Trucking Industry Shared TELPAK Services (J.A. 437) 36a

Service to Public Through Airlines TELPAK (J.A. 1086-1091) 37a

Appendix E—Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Docket No. 16979, FCC 66-1004 ..... 41a

Appendix F—Illustrative Excerpts From Unprinted Transcript 43a

INDEX TO CITATIONS

Page

Airfreight Rate Case, Minimum Rates for Airfreight Forwarders, 26 C.A.B. 339 (1958) 14

Allocations of Frequencies in the Bands Above 890 Mc, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960) 3

American Airlines, Inc. v. *CAB,* 235 F.2d 845 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 905 (1957) 26

American Airlines, Inc. v. *CAB,* 359 F.2d 624 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 843 (1966) 14

American Tel. & Tel. Co., 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966) 9, 21, 29, 31

Amos Treat & Co. v. *SEC,* 306 F.2d 260 (D.C. Cir. 1962) 23, 28

Baltimore & O. R.R. v. *United States,* 345 U.S. 150 (1953) 17

Bruce's Juices, Inc v. *American Can Co.,* 330 U.S. 743 (1947) 12

Chicago, M. & St. P. Ry. v. *Minnesota,* 134 U.S. 418 (1890) 27

City of Rochester v. *Rochester Gas & Electric Corp.,* 33 N.Y. 39, 134 N.E. 828 (1922) 12

Columbia Research Corp. v. *Schaffer,* 256 F.2d 677 (2d Cir. 1958) 23, 28

Davis & Randall, Inc. v. *United States,* 219 F.Supp. 673 (W.D.N.Y. 1963) 25

FCC v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940) 17

Gonzales v. *United States,* 348 U.S. 407 (1955) ...23, 26, 28

Gonzales v. *United States,* 364 U.S. 59 (1960) 23

Grain in Multiple-Car Shipments—River Crossings to the South, 318 I.C.C. 641 (1963) 19

Hannah v. *Larche,* 363 U.S. 420 (1960) 23, 26

ICC v. *Baltimore & O. R.R.,* 145 U.S. 263 (1892) 14, 15

ICC v. *Delaware, L. & W. R.R.,* 220 U.S. 235 (1911) .. 14

ICC v. *Louisville & N. R.R.* 227 U.S. 88 (1913) 26

ICC v. *New York, N. H. & H. R.R.* 372 U.S. 744 (1963) 16

Page

Michigan Consolidated Gas Co. v. *FPC*, 283 F.2d 204 (D.C. Cir. 1960) 17
Mississippi Valley Barge Line Co. v. *United States*, 292 U.S. 282 (1934) 17
Molasses from New Orleans, La., to Peoria and Pekin, Ill., 235 I.C.C. 485 (1939) 14
Morgan v. *United States*, 304 U.S. 1 (1938) 22, 24, 28
Murchison, In re, 349 U.S. 133 (1955) 23
Nashville, C. & St. L. Ry. v. *Tennessee*, 262 U.S. 318 (1923) 11
Opp Cotton Mills, Inc. v. *Administrator*, 312 U.S. 126 (1941) 26
Pan American World Airways, Inc. v. *CAB*, 261 F.2d 754 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 912 (1959) 26
Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Docket No. 16797, FCC 66-1004 (App. 41a) 19
Rules Governing Ex Parte Communications in Hearing Proceedings, 1 F.C.C. 2d 49 (1965) 9, 21, 31
Saalfield Publishing Co. v. *Atchison, T. & S. F. Ry.*, 274 I.C.C. 584 (1949) 15
Sangamon Valley Television Corp v. *United States*, 269 F.2d 221 (D.C. Cir. 1959) 23, 28
Southern Ry. v. *Virginia*, 290 U.S. 190 (1933) 26
Texaco, Inc. v. *FTC*, 336 F.2d 754 (D.C. Cir. 1964) .. 23
Trans World Airlines, Inc. v. *CAB*, 254 F.2d 90 (D.C. Cir. 1958) 23
United States v. *Abilene & So. Ry.*, 265 U.S. 274 (1924) 24, 31
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 25
Willner v. *Committee on Character*, 373 U.S. 96 (1963) 23
Wilson & Co. v. *United States*, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965) 21
Wine, Pacific Coast to the East, 329 I.C.C. 167 (1966) . 17
Wong Yang Sung v. *McGrath*, 339 U.S. 33 (1950) ...28, 31

Constitution and Statutes Page

CONSTITUTION OF THE UNITED STATES, AMENDMENT V (App. 26a) 3, 20, 29
Administrative Procedure Act 3, 27, 28, 29, 32
Section 2, 5 U.S.C. § 1001 (App. 30a) 27, 29
Section 5, 5 U.S.C. § 1004 (App. 31a) 27, 29
Section 8, 5 U.S.C. § 1007 (App. 32a) 20
Section 12, 5 U.S.C. § 1011 (App. 32a-33a) 29
Communications Act of 1934, as amended 3, 17, 19, 29
Section 1, 47 U.S.C. § 151 (App. 26a-27a) 18
Section 201, 47 U.S.C. § 201 (App. 27a) 2, 5, 6, 11-13
Section 202, 47 U.S.C. § 202 (App. 27a) .. 2, 5, 6, 10-13, 17
Section 204, 47 U.S.C. § 204 (App. 28a) 26
Section 205, 47 U.S.C. § 205 (App. 28a) 26
Section 402, 47 U.S.C. § 402 2
Section 409, 47 U.S.C. § 409 (App. 29a-30a) 29
Interstate Commerce Act 15
Section 2, 49 U.S.C. § 2 ..... 11, 13
Judicial Code, section 1254 (1), 28 U.S.C. § 1254(1) .. 2
Judicial Review Act, section 10, 5 U.S.C. § 1040 2

Other Authorities

Administrative Conference of the United States, Final Report, Recommendation No. 19, S. Doc. No. 24, 88th Cong., 1st. Sess. (1963) 31
Administrative Conference Committee on Rule Making, *Improvement in the Conduct of Federal Rate Proceedings*, S. Doc. No. 24, 88th Cong., 1st Sess. (1963) 24, 32
CAB Regulation No. PS-24, Policy Statements, Amendment No. 3 to Part 399—Statements of General Policy on Blocked Space Service (1964), 14 C.F.R. § 399.37 13
Comments of Federal Communications Bar Association, June 11, 1964, FCC Docket 15381 31
Comments of Federal Communications Bar Association on Petition for Reconsideration, Oct. 6, 1965, FCC Docket 15381 31
Comments of the American Bar Section on Administrative Law on Petition for Reconsideration, Mar. 18, 1966, FCC Docket 15381 31

Page

92 Cong. Rec. (1946) 27
2 Davis, Administrative Law Treatise (Supp. 1965) 31
H. R. Rep. No. 1850, 73rd Cong., 2d Sess. (1934) 13
H. R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) 27, 28
S. Rep. No. 781, 73rd Cong., 2d Sess. (1934) 13
S. Rep. No. 752, 79th Cong., 2d Sess. (1945) 27
S. Rep. No. 1234, 89th Cong., 2d Sess. (1966) 27
Staff Study, Administrative Conference of the United States, Procedures for Handling Rate Cases in the CAB (1962) 30
Staff Study, Administrative Conference of the United States, The Conduct of Rate Proceedings in the FPC (1962) 30
Staff Study, Administrative Conference of the United States, The Conduct of Rate Proceedings in the ICC (1961) 30

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Trucking Associations, Inc., Twin Coast Newspapers, Inc., Aeronautical Radio, Inc., Air Transport Association of America, American Airlines, Inc., Eastern Airlines, Inc., and Lockheed Aircraft Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 15, 1966.

OPINIONS BELOW

The tentative decision of the Federal Communications Commission (J.A. 681-721)[1] is reported at 38 F.C.C. 370 (1964); the memorandum opinion and order of the Commission on final decision (J.A. 1116-31) is reported at 37 F.C.C. 1111 (1964); and the memorandum opinion and order of the Commission on reconsideration (J.A. 1173-87) is reported at 38 F.C.C. 761 (1965). The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported, and appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered on September 15, 1966. The jurisdiction of this Court is invoked under section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1), section 402(j) of the Communications Act of 1934, 47 U.S.C. § 402(j), and section 10 of the Judicial Review Act, 5 U.S.C. § 1040.

QUESTIONS PRESENTED

1. Whether, in order to determine the legal propriety of developmental volume communications rates such as those here involved, section 202(a) of the Communications Act, proscribing unjust discrimination, is completely self-sufficient, or whether it should be read together with section 201(b) permitting "commercial"

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[1] Citations to the joint appendix filed in the court below and with this Court are designated "J.A." Citations to other parts of the record certified by the Court of Appeals are designated "R." References to the unprinted transcript in the Commission's proceeding are designated "Tr." Other references to the unprinted record in the Commission's proceedings are designated "U.R." References to the appendix hereto are designated "App."

(a volume use classification) and other "reasonable" classifications, and in the light of the "public interest" developmental mandates of the Act.

2. Whether constitutional due process is denied when a Bureau of the Federal Communications Commission, which actively participated as a party in a vigorously contested rate case, is permitted through the same personnel to draft the agency's initial decision, and to advise and assist ex parte the agency members in reaching their decisions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the Communications Act of 1934, as amended, and the Administrative Procedure Act are set forth in Appendix C hereto, pages 26a to 33a, *infra*.

STATEMENT OF THE CASE

A. On the Discrimination Question

TELPAK, the subject of these proceedings, is a tariff offering by the American Telephone and Telegraph Company (hereinafter "AT&T") of developmental volume communications rates to meet the large and growing requirements of government, commerce, and industry for large capacity communications facilities between specified points (J.A. 1188). In a rule making proceeding, *Allocations of Frequencies in the Bands Above 890 Mc*, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960), the Federal Communications Commission (hereinafter "the Commission" or "the FCC") for the first time issued general authorization for private enterprises to construct their own microwave facilities, thereby permitting bulk communication users to

meet their requirements by private systems purchased at relatively low cost from non-carrier manufacturers (J.A. 126, 1341). In response to the needs of the national economy and the competition of private microwave systems, the TELPAK tariff was filed by the carrier on January 16, 1961 (J.A. 1308-28).

TELPAK provides communications paths of various widths (TELPAK channels) capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile, and data. Four sizes of channels are offered, TELPAK A, B, C, and D, having carrier spectrum assignments of 48, 96, 240, and approximately 1,000 kilocycles per second, respectively. Monthly charges for the basic transmission path and for terminating the channels at the customers' premises vary with the size and length of the TELPAK channel and the type and number of circuit terminations provided. When TELPAK was first offered, AT&T estimated that its existing customers would be able to effect savings in charges ranging between $6 million and $12 million annually (J.A. 1188-89).[2]

After a controversy arose concerning the identity of the channels to be furnished, AT&T filed an amendment to the TELPAK tariff to clarify its intention to furnish at its discretion either single broadband "discrete" channels or various "diverse" channels to meet a customer's requirements (J.A. 1255-56). Following

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[2] By April 1, 1965, there were 1,190 interstate TELPAK customers using the equivalent of 18,000,000 voice channel miles, accounting for monthly revenues of approximately $8,800,000, or $105,600,000 per annum (AT&T Application for Interlocutory Injunction, July 1, 1965). The Commission has estimated savings of 51%, 64%, 77%, and 85% on TELPAK A, B, C, and D respectively (J.A. 694).

protests by Western Union Telegraph Company, AT&T's common carrier competitor (J.A. 1256-76), and Motorola, Inc., a private microwave equipment manufacturer (J.A. 1276-93), the Commission on September 8, 1961, suspended the tariff for the three-month statutory period and ordered an investigation upon four issues: (1) whether the charges were unjust and unreasonable under section 201(b) of the Communications Act;[3] (2) whether there would result any unjust or unreasonable discrimination or prejudice under section 202(a);[4] (3) whether TELPAK would have unlawful competitive effects upon other carriers or upon private manufacturers; and (4) whether the Commission should prescribe rates (J.A. 6-10).

During hearings before a hearing examiner extending over thirty-six days in 1961 and 1962, Motorola and Western Union intervened in opposition to the TELPAK rates. Numerous users of TELPAK serv-

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[3] "All charges, practices, classifications, and regulations for or in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications . . . ." 47 U.S.C. § 201(b).

[4] "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

ice, including petitioners herein, intervened in support of the tariff, presenting extensive evidence concerning their dependence upon the TELPAK offering for the expansion of their communications facilities and the resultant beneficial effects upon the economics and efficiency of their operations and services to the public (J.A. 267-530).

The Commission issued its tentative decision on March 18, 1964 (J.A. 681-721), adopted the findings and conclusions therein by a memorandum opinion and order issued on December 23, 1964 (J.A. 1116-31), and affirmed on reconsideration on May 3, 1965 (J.A. 1173-87). No findings were made or conclusions reached on Issue "(1)" relating to the applicability of section 201(b) of the Act. On Issue "(2)" the Commission found TELPAK A and B to be discriminatory under section 202(a) of the Act, holding that TELPAK services are "like" private line services offered under another tariff at higher rates; that no material cost differences are attributable to TELPAK service as compared to private line services; that TELPAK A and B are not justified by competitive necessity; and that the record was inadequate to permit a determination whether TELPAK C and D are compensatory, although apparently justified by competitive necessity (J.A. 718). On Issue "(3)" the Commission declared it was unnecessary to determine whether TELPAK rates are lawful in relation to competition, but noted "in passing" that substantial revenues may have been diverted from Western Union and that the establishment of private microwave systems may have been effectively inhibited (J.A. 717-19). The Commission did not itself prescribe new rates under Issue "(4)," but ordered AT&T to "unify" TELPAK A and B

rates with private line rates, and to furnish a cost justification for TELPAK C and D (J.A. 1127).

B. On the Due Process Question

The Commission's order instituting the TELPAK investigation specified that the examiner to be designated to preside at the hearing would certify the record to the Commission for decision without preparing either an initial or recommended decision (J.A. 10). AT&T and intervenor Aeronautical Radio, Inc., requested modification of the order to provide for initial decision by a hearing examiner, and requested that the Commission's Common Carrier Bureau not be permitted to participate in the decisional stage of the proceeding (J.A. 11-18). These requests were opposed by intervenors Motorola (J.A. 36-41) and Western Union (J.A. 22-24), and by the Common Carrier Bureau (J.A. 24-35). The Commission by order issued February 12, 1962, denied the requests for modification, with Commissioner Ford dissenting (J.A. 51-56), and clearly indicated that it would rely upon the Common Carrier Bureau to draft the initial decision (J.A. 53).[5]

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[5] Since petitioners had argued that expedition did not require omission of a decision by the hearing examiner, and the Commission had failed to find facts as to the necessity for such omission as required by its rules, the Commission thereupon made such a finding in the conclusory language of the rule: "The essentiality of expedition to this proceeding is implicit in petitioners' arguments in their pleadings. That the Examiner's decision may be omitted under similar conditions likewise is clear. Accordingly, we find here upon the record that due and timely execution of our functions unavoidably and imperatively requires the certification of the record by the Hearing Examiner in this proceeding to us for Initial Decision without Initial or Recommended Decision by such Examiner." (J.A. 53.)

From the beginning of the hearing, the Common Carrier Bureau appeared as a party, through its counsel, William M. Lesher and Peter M. Andersen (J.A. 1337, Tr. 4-5, U.R. 547 (p. 6), 50-51). These counsel, together with other counsel from the Bureau who appeared later in the hearing, took an active part in the hearing, with extensive cross-examination of witnesses (see, *e.g.*, J.A. 1348-50, 1357-59, 1363-66, 1370-71, 1374-82, 1388, 1436-37, 1463-64, Tr. 1743-99, 2100-05, 2176-84), and objections to evidence (see, *e.g.*, J.A. 591-94, 4160-61, 1471, Tr. 2373-74).[6]

The presiding examiner, recognizing his figurehead capacity, repeatedly requested the advice of the Bureau counsel before making rulings upon the evidence, with the explicit recognition that Bureau counsel would be writing the tentative decision (see, *e.g.*, Tr. 1731-32, 1901, 1928, 1982-83, 1985, 1988, 1993, 2010-11, 2088, 2373-74).[7] Thus, at one point the examiner asked Bureau counsel whether he considered certain proffered evidence to be material, and stated: "After all, I recognize the fact, Mr. Lesher, that you are going to be responsible, I assume, for writing the initial decision in this case." (J.A. 1460.)

The tentative decision of the Commission was in fact prepared by the Bureau counsel, Mr. Lesher, Mr. Andersen, and persons working under their direction (see J.A. 53, 992-94, 1175, Tr. 1982-83, 2529, 2535). Bureau counsel also participated in closed conferences off-the-record with the Commissioners to discuss the tentative decision, the exceptions of other parties, and

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[6] Illustrative quotations from the unprinted transcript are reprinted in Appendix F.

[7] See *ibid.*

the final decision and order (see J.A. 53, 992-94, 1175). The Commission has admitted that under existing procedures "the Bureau conducts an investigation and participates in the hearing. . . . The Bureau also, however, has an active role in the decision of record rulemaking proceedings." *Rules Governing Ex Parte Communications in Hearing Proceedings,* 1 F.C.C. 2d 49, 52 (1965); see also *American Tel. & Tel. Co.,* 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966).

C. Proceedings Before the Court of Appeals

Eight petitions for review were filed before the United States Court of Appeals for the District of Columbia Circuit, Western Union alone intervening in opposition to the petitions. After an interlocutory injunction was granted on August 13, 1965, pending review, the Court of Appeals affirmed the orders of the Commission on September 15, 1966. Motions to stay the transmission of the court's opinion and certified copy of its judgment were denied by the Court of Appeals by order entered October 18, 1966.

REASONS FOR ALLOWANCE OF THE WRIT

The substantive and procedural anomalies of this rate increase case, some of which have been noted above, and others of which are hereinafter developed, are matched only by the importance of the case to the future of rate regulation of the communications industry and, indeed, possibly to the future of rate-making in general.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL STATUTORY LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Case Presents the First Judicial Review of Section 202(a) of the Communications Act of 1934, and Its Applicability to Competitive Rate-Making

For the first time in its history, judicial review is sought of section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 202(a), which was invoked by the FCC, in an unduly narrow construction and out of statutory context, to condemn as "discriminatory" bulk package rate offerings by AT&T and the Bell system to users of their facilities having an expanding need for large volume communications services. AT&T itself recognized in its brief before the court below:

> This is a landmark case in the communications industry. Legal standards important to competitive rate making in the communications industry are before the courts for the first time in this case.

And indeed the court below manifestly recognized the importance of its decision in commending the full text of the three Commission opinions "to the attention of any other reviewing authority and of any student researching in this area" (App. 25a).

B. The Court of Appeals Has Too Narrowly Construed Section 202(a) Without Regard to Statutory Context

In upholding the Commission's action striking down developmental volume rates as discriminatory under section 202(a) of the Act, the Court of Appeals stated:

> The prohibition against different charges to different customers for like services under like cir-

> cumstances is flat and unqualified. The pertinent section of the statute bristles with "any". It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. [App. 17a.]

But section 202(a) of the Communications Act, like section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, from which it was derived, does not prohibit every discrimination, but "only that discrimination which is unreasonable, undue, or unjust," *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923).

"The money difference in price," declares the Court of Appeals, "is the core of the proscription" (App. 17a). But a money difference in price by definition is contemplated as valid and permissible in the express companion provision, section 201(b) of the Act, that "different charges may be made for the different classes of communications," 47 U.S.C. § 201(b). Thus, communications thereunder "may be classified into day, night [classification by time], repeated, unrepeated [classification by frequency], letter [classification by form], *commercial* [classification by volume user], press, Government [classification by character of the user] and such other classes as the Commission may decide to be just and reasonable" *(ibid.)* (emphasis added). TELPAK is merely a manifestation in the communications industry of common classifications by volume use and volume user—represented in the acceptation of classes such as "residential," "commercial," and "industrial" in gas, electric, and other utility tariffs. ***TELPAK is in effect a "large commercial" classification.***

Volume discounts find everyday acceptance in our economic system. "Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacture-jobber relations. They are common in regulated as well as unregulated price structures." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 745-46 (1947). "The commuter does not pay the same rate as the occasional traveler. The shipper by carload is not charged as the shipper of a single package. Telephone rates per message are lowered as the number of messages increases. Charges for water vary with the quantity consumed." *City of Rochester* v. *Rochester Gas & Electric Corp.*, 33 N.Y. 39, 48, 134 N.E. 828, 831 (1922) (Cardozo, J., for the court) (citations omitted).

The thrust of the Commission's decision is that volume rates are discriminatory, and therefore unlawful under section 202(a) of the Act, unless affirmatively justified by a difference in costs or competitive necessity. This gloss upon section 202 (a) is no part of the Act. Indeed, not one of the classes enumerated by illustration in section 201(b) as reasonable differentiations can be justified on a cost or competitive necessity basis, except perhaps to the limited extent it may be inferred that cost savings are inherent in volume uses or users—an inference which is necessarily fully as applicable and valid for TELPAK volume rates.

Section 201(b), however, was completely ignored by the Commission and the court below, despite the fact that the very *first* issue designated by the Commission in defining the scope of the hearing expressly called for determination of the applicability of section 201 (b) of the Act (J.A. 685). Nevertheless, through

three successive opinions of the Commission and the opinion of the Court of Appeals, not a single reference was made to the possible reasonableness of TELPAK rates as a class of rates under section 201(b), much less was any determination made of that issue.

The egregious effect of this narrow interpretation of section 202(a) out of statutory context is to impinge upon basic principles of communications rate-making by rejecting virtually every classification as discrimination, and virtually every discrimination as invidious and as unlawful, despite the express classification and price differentiation provisions of section 201(b).

C. The Court of Appeals' Interpretation is in Conflict With Decisions of This Court Interpreting Comparable Provisions of the Parent Interstate Commerce Act and Other Similar Acts

The prohibition of section 202(a) of the Communications Act against unjust or unreasonable discrimination was purposefully drawn by the Congress to conform with comparable provisions of section 2 of the Interstate Commerce Act, 49 U.S.C. § 2. S. REP. No. 781, 73rd Cong., 2d Sess. 4 (1934); H. R. REP. No. 1850, 73rd Cong., 2d Sess. 5 (1934). The action striking down TELPAK volume rates under section 202(a), however, violates the settled interpretation upholding the validity of comparable volume shipment rates under the parent Act:

> It is well settled that differences in the quantities shipped as a single shipment may afford a fair and reasonable basis for differences in transportation rates. In railroad transportation, these differences are currently recognized as between carload, less-than-carload, and any-quantity lots. In truck transportation, in addition to truckload and less-than-truckload rates there are so-called volume rates. In connection with the latter, there is no

requirement as to the loading in a single truck. [*Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I.C.C. 485, 498-99 (1939).]

There is indeed a striking historical parallel in the shared use of TELPAK services by various members of the airline, trucking, and other industries with the traditional shared use of carload rates in railroading, *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 242-43 (1911).

The rate "spreads" between volume and non-volume rates, based upon a volume classification and not upon a demonstrated cost differential, have been the life blood of the forwarding business in the railroad industry, *ibid.*, as well as the airline industry, where "weight breaks" are a usual and normal practice, *Airfreight Rate Case, Minimum Rates for Airfreight Forwarders*, 26 C.A.B. 339, 341-42 (1958).

In principle, TELPAK rates are not unlike the commutation ticket rates long upheld, *ICC* v. *Baltimore & O. R.R.*, 145 U.S. 263, 277-78 (1892), in the railroad industry, whereby a payment is made at a discount for tickets whether or not all of the trips contracted for are taken. Nor are they unlike the "blocked space" tariffs in the airline industry, which permit shippers to reserve a particular amount or "block" of cargo space on a regular recurring basis at rates which are reduced, but must be paid whether or not all the space is used. *CAB Regulation No. PS-24, Policy Statements, Amendment No. 3 to Part 399 —Statements of General Policy on Blocked Space Service* (1964),[8] now codified as 14 C.F.R. § 399.37.

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[8] Affirmed on rehearing en banc *sub nom. American Airlines, Inc.* v. *CAB*, 359 F. 2d 624 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

TELPAK A and B rates provide developmental volume charges for 12 and 24 voice grade communications channels equivalent to such "carload" and "weight break" quantity charges. To declare them invalid is in direct conflict with this Court's decisions accepting similar practices under the parent provisions of the Interstate Commerce Act and with the recognized comparable rate practices of the regulated airline industry.

D. In Striking Down Certain Rates as Discriminatory, Although Only in Theory, the Commission Creates a Greater Real Discrimination, to the Short Range Benefit Only of AT&T and a Less Efficient Competitor

TELPAK A and B rates for 12 and 24 voice channels have been declared unlawful upon findings of theoretical discrimination in the abstract by comparison with private line tariffs, not upon a showing of actual injury.[9] At the same time, the Commission has indicated that there exists apparent justification for

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[9] No party offered evidence of injury to non-volume users resulting from the TELPAK offering. One intervenor alone, United Press International, complained that an advantage accrued to its competitor because of the levels of the rates (J.A. 719). One user, however, "cannot be said to be injured by the fact that another is able in a particular instance" to receive a more favorable rate. *ICC* v. *Baltimore & O. R.R.*, 145 U.S. 263, 280-81 (1892). Nor can injury to non-users be inferred from a mere difference in rates: "That there are in existence commodity rates . . . on a level lower than the applicable rates . . . does not of itself show that this difference in rates results in any undue prejudice to complainant in the marketing of its products. To establish undue prejudice and preference, the evidence must be such as to make reasonably clear how and where an assailed disparity in the relative levels of rates operates to the advantage of parties or traffic alleged to be favored and to the detriment of other parties or traffic. They may not be assumed or left to inference. General declarations as to competition, unsupported by evidentiary facts, and a mere showing of disparity of rates do not warrant a finding of undue prejudice and preference." *Saalfield Publishing Co.* v. *Atchison T. & S.F. Ry.*, 274 I.C.C. 584, 588 (1949).

TELPAK C and D rates of 60 and 240 voice grade channels (J.A. 1125-26). The result is that the Commission, purportedly protecting smaller users unable to qualify for the smaller volume rates, has not ameliorated but heightened any real discrimination. Common carrier customers with inadequate requirements for TELPAK C and D rates now would be deprived of any opportunity to benefit from TELPAK A and B rates, unlike the larger users. In addition, users in localities with heavy traffic can continue to receive the benefits of TELPAK C and D rates, but users in smaller communities with more modest channel requirements are deprived of intermediate volume rates (see App. D, pp. 35a-40a).

This anomaly succeeds in bestowing a rate increase benefit (but only for the short run[10]) only upon AT&T and Western Union, its common carrier competitor and chief protagonist in these proceedings, although the Commission has specifically declined to assess TELPAK's lawfulness in relation to competition (J.A. 717-18). This Court has held, however, that the Commission may not serve as a "giant handicapper" to require rates to be raised to an artificially high level merely to protect a less efficient competitor. *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744, 757-58 (1963).

There is all the more reason why a common carrier should be permitted to establish developmental volume rates where, as here, they are designed to meet the competition of an unregulated competitor (in this case, Motorola) whose costs are undisclosed (J.A. 1448, 1453,

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[10] In the short run, present TELPAK users will of necessity continue to rely upon common carrier facilities. In the longer run, where practicable, present TELPAK users will acquire their own private microwave facilities in preference to higher cost private lines leased from common carriers.

1456) and whose prices are subject to change without notice or restriction. *Cf. Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 284 (1934); *Wine, Pacific Coast to the East,* 329 I.C.C. 167 (1966).

E. The Court of Appeals' Decision Would Impose a Severe Burden Upon Users of Bulk Communications, and Inhibit National Economic Growth Attributable to the Greater Reliance Upon Communications Services

In respects which are critical for rate regulation in the communications industry, both the Commission and the court below have misconceived the legal significance of developmental volume rates, in concluding that they can be justified only by demonstrable cost savings or precise competitive necessity (J.A. 1122-23; App. 19a). It is submitted that there is an even higher, over-riding consideration which is applicable across the board and which must ultimately govern—the public interest standard, equally controlling in all the regulated industries, *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 142-43 (1940), *cf. Baltimore & O. R.R.* v. *United States,* 345 U.S. 146, 150 (1953), and permeating the fabric of the Communications Act. "In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding." *Michigan Consolidated Gas Co.* v. *FPC,* 283 F. 2d 204, 226 (D.C. Cir. 1960).

In the sterilizing application of section 202(a) to TELPAK rates, both the Commission and the Court of Appeals have also misconceived the factual significance of the case, in failing to recognize the public interest achievements of developmental volume communications rates in stimulating the broad surge in the use of communications services and facilities. It is no exaggeration, and the record fully demonstrates, that business and industrial enterprises throughout the country, large and small, have constructed vast, com-

plex, and in many cases nationwide communications networks around the TELPAK offerings, upon which they rely to meet their communications needs efficiently and effectively; that TELPAK A and B rates are an integral aspect of these networks, serving communities which could not otherwise be served and acting as building blocks in national communications systems for service to the public as well as for private business; that there has been a revolutionary increase in the reliance on communications systems which has lead to major and dramatic improvements on a nationwide basis in the efficiency and sophistication of communications facilities; and conversely, that the availability of such "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (section 1 of the Communications Act, 47 U.S.C. § 151) represented in the TELPAK rates have contributed enormously to business and industry expansion in meeting public needs (J.A. 267-530).

The essence of the TELPAK rates in stimulating the explosion in the use of communications facilities for business and industrial needs has been precisely the developmental or promotional character of the charges, in contrast with the levels (prohibitive in large part) of private line charges.[11]

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[11] As one example, in the case of the airline industry, elimination of TELPAK A and B would increase the cost of equivalent facilities for TELPAK A by 82.7%, or an additional $502,224 per annum, and for TELPAK B by 101.8%, or an additional $547,176 per annum (R. 1627). Although there has been a notable improvement in airline operations, reservations and other services, organization, and structure attributable to improved communications facilities, the obvious reaction to an increase in charges of this magnitude would be a curtailment of services and a revision in operations in line with budgetary allocations (R. 1628).

In the case of the trucking industry, as another example, which ranks third among the largest TELPAK users (after the Govern-

Likewise incalculable is the stultifying effect of the greatly increased rates upon the requirements of other industries for voice, data processing, high speed facsimile, and other volume communications facilities.[12] In laying a deadening hand upon technological innovation through developmental volume communications rates, the Commission has effectively suspended and retarded the tangible contributions which can be made to meet public needs. Such technological efficiencies and managerial initiative constitute elements to be promoted under the national policy of the Communications Act, rather than to be stultified. *Cf. Grain in Multiple-Car Shipments—River Crossings to the South,* 318 I.C.C. 641, 690 (1963).

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ment and the airline industry), and is composed in the overwhelming majority of small companies, elimination of TELPAK A and B rates would approximately double the $1,825,000 per annum paid for TELPAK A and B facilities alone over 8,570 miles (R. 1644-45). In many cases these facilities would very likely be abandoned, utilization of TELPAK C and D facilities would be reduced as economically unfeasible, and there would be "an incalculable dislocation in a variety of shipper services now achieved by the use of TELPAK facilities including central dispatching and scheduling of over-the-road vehicles, quick and efficient transmission of freight bills from origin to destination and tracing of lost and delayed shipments" (R. 1645-47).

[12] The public interest aspect of the growing interdependence between computers and high speed facsimile facilities and communications facilities such as TELPAK was one of the matters of significance pointed out by the interventions of Xerox and IBM in the Commission proceeding (J.A. 733, 755-64). Belatedly, the Commission on November 9, 1966, embarked upon a public inquiry into the regulatory and policy questions which are being raised by the growing interdependence of computer services and technology, and communications facilities and services of common carriers (App. E, pp. 41a-42a).

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FEDERAL COMMUNICATIONS COMMISSION'S UNIQUE PROCEDURES ARE IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING PRINCIPLES OF CONSTITUTIONAL DUE PROCESS.

The Court of Appeals disposed of the challenge to the FCC's procedures in two short sentences of its opinion:

> . . . Section 8(a) of the Administrative Procedure Act permits the agency itself to issue a tentative decision in place of an examiner's report. Examination of this record satisfies us that the Commission complied with all procedural requirements. [App. 23a.]

With all due respect, it is submitted that the Court of Appeals misconceived the constitutional due process error complained of by the petitioners. It was not the mere absence of an examiner's report. Instead, it was absence of a fair hearing by reason of:

(1) Absence of an examiner's report, without any factual findings to support the belated, purely conclusory finding on the necessity for by-passing such report (J.A. 10, 53);

(2) Participation of Bureau counsel, as an active advocate in the proceeding, lined up on issues of consequence with the only other opponents of TELPAK, namely, Motorola and Western Union (*e.g.*, J.A. 591-94, 1348-50, 1357-59, 1363-66, 1370-71, 1374-82, 1388, 1436-37, 1460-61, 1463-64, 1471, Tr. 1743-99, 2100-05, 2176-84, 2373-74, 2426);[18]

(3) Deferral of the examiner to Bureau counsel on all important rulings on evidence, in view of the pre-announced order of the Commission to

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[18] Illustrative quotations from the unprinted transcript are reprinted in Appendix F.

the effect that Bureau counsel would write the initial decision (*e.g.*, Tr. 1731-32, 1901, 1928, 1982-83, 1985, 1988, 1933, 2088, 2373-74);[14]

(4) Actual drafting of the initial decision by Bureau counsel (J.A. 53, 992-94, 1175, 1460);

(5) Absence of any briefing or oral argument on the merits by Bureau counsel which would have indicated the Bureau position and given the other parties the opportunity to rebut; and

(6) Participation of Bureau counsel in ex parte consultation with the Commission on its final decision (*e.g.*, J.A. 53, 992-94, 1175; *Rules Governing Ex Parte Communications in Hearing Proceedings,* 1 F.C.C. 2d 49 (1965); *American Tel. & Tel. Co.,* 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966)).

The Commission acknowledges that its unusual procedures are "consistently employed" and "have been used in several recent important Commission rate-making proceedings." *American Tel. & Tel. Co., supra* at 144. The Commission is even now employing these procedures in a rate proceeding (*ibid.*), in specific reliance upon *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), *cert. denied on this issue,* 380 U.S. 951 (1965), and this Court's denial of certiorari there, as support for the legality of its procedures. Unless stopped by this Court the Commission will continue to use these questionable procedures, and other administrative agencies will feel free to use similar procedures in rate-making and other "rule making" proceedings. If these procedures are basically and constitutionally unfair, as we submit they clearly are, important rate proceedings of even greater length

[14] See *ibid.*

and scope than here involved will be jeopardized in their entirety.

The Commission's procedures conflict with the principle that due process is denied when a participant in an administrative proceeding—whatever the interest represented by him—is permitted to intervene ex parte in the decision-making process. This is the clear holding of *Morgan* v. *United States,* 304 U.S. 1 (1938), which involved a rate-making proceeding before the Secretary of Agriculture. Counsel from the Department's Bureau of Animal Industry participated in the hearing, and then drafted findings for presentation to the Secretary and participated in several private conferences with the Secretary with respect to these findings. In this context, this Court said:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings *of a quasi-judicial character* the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. [304 U.S. at 14-15. (Emphasis added.)]

In holding thereafter that the ex parte presentations by Bureau counsel to the Secretary without notice or opportunity to respond being granted to other participants violated due process, this Court stated:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party

> and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. [304 U.S. at 18-19.]

Other applications of this principle are found in, *e.g., Gonzales* v. *United States,* 348 U.S. 407 (1955);[15] *Willner* v. *Committee on Character,* 373 U.S. 96 (1963); *In re Murchison,* 349 U.S. 133 (1955); *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (D.C. Cir. 1959); *cf. Gonzales* v. *United States,* 364 U.S. 59, 66 (1960) (dissenting opinion); *Hannah* v. *Larche,* 363 U.S. 420 (1960).[16]

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[15] In holding there that fairness required that a selective service exemption applicant be allowed to inspect the recommendation of the Department of Justice, this Court stated: "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions. . . . [T]he right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." 848 U.S. at 414-15.

[16] The decision below is also aberrational when measured against the general march toward fairness in administrative proceedings. See, *e.g., Amos Treat & Co.* v. *SEC,* 306 F. 2d 260, 266-67 (D.C. Cir. 1962); *Trans World Airlines, Inc.* v. *CAB,* 254 F. 2d 90, 91 (D.C. Cir. 1958); *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677 (2d Cir. 1958); *Texaco, Inc.* v. *FTC,* 336 F. 2d 754 (D.C. Cir. 1964). As the court stated in the *Trans World Airlines* case: "The fundamental requirements of fairness in the performance of such [quasi-judicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit." 254 F. 2d at 91.

In the present case Bureau counsel who were advocates in the case[17] also participated ex parte in the decision-making process. The inherent vice in entrusting the initial selection of evidence and preparation of findings to an advocate is shown in the present case. The tentative decision (J.A. 681-721) drafted by the Common Carrier Bureau counsel (and which other parties did not see until its issuance by the Commission) accorded little or no weight to evidence presented by numerous users of the new communications services.[18] The tentative decision was clearly the critical document in this case. The Court of Appeals stated: "The findings and conclusions of the Tentative Decision were in major part affirmed [by the Commission] without extended discussion. Our review, therefore, is directed procedurally to the more comprehensive Tentative Decision of March 20, 1964." (App. 11a.)

The Commission claims that the interests of other parties are protected because if the staff commits error, it will show up in the tentative decision and

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[17] The facts in this case clearly belie the Commission's contention that the position of Bureau counsel in a rate proceeding is not "adversary." An argument in *Morgan* v. *United States*, 304 U.S. at 20, that the Bureau counsel's position there was not "adversary" was dismissed by this Court as one which "has regard to the mere form of the proceeding and ignores realities." See also *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924). The Administrative Conference Committee on Rulemaking noted that when an agency staff participates in rate cases, "it is inevitable that the staff to a degree will become merely another adversary party to the proceeding." S. Doc. No. 24, 88th Cong., 1st Sess. 85 (1963).

[18] Thus the General Services Administration, an agency of the United States, stated in its "Exceptions and Supporting Reasons" that the tentative decision failed "to consider or give weight to testimony and evidence presented by GSA and other customer intervenors" (J.A. 812-13), and that in many instances "the Tentative Decision completely ignores the arguments of GSA and other customer intervenors" (J.A. 815; see also J.A. 822, 824-25).

will be corrected on the basis of the exceptions filed by parties. But the same Bureau counsel who prepare the tentative decision also confer ex parte and advise the Commission with respect to the validity of the exceptions and the form of the final decision. It strains credulity to believe that these persons will not have protective instincts with respect to their tentative decision. Judge Friendly, speaking for a three-judge court, recently disposed of a claim much the same as that of the Commission by observing that "for commissioners, as for judges, freedom of decision is at least subconsciously constricted once a position has been publicly taken." *Davis & Randall, Inc.* v. *United States,* 219 F. Supp. 673, 679 (W.D. N.Y. 1963).

The FCC's order dispensing with a hearing examiner's report was also arbitrary under the Commission's own rules which then provided, in pertinent part, that the examiner designated for the proceeding "shall prepare an initial (or recommended) decision," except where "the Commission finds *upon the record* that due and timely execution of its functions imperatively and unavoidably requires that no recommended decision be issued by the presiding officer." 22 Fed. Reg. 10991-92 (1957). (Emphasis added.) No finding in this respect was made by the Commission at the time of its original order on September 8, 1961 (J.A. 6-10), and when this deficiency was pointed out, a perfunctory finding was made only in the exact conclusory language of the rule without any specific findings based upon facts particular to this case (J.A. 52-53).[19] An agency must comply with its published rules, *e.g., Vitarelli* v. *Seaton,* 359 U.S. 535 (1959), and a finding required

[19] The fact that Bureau counsel took 15 months to prepare the tentative decision certainly belies the Commission's conclusion that due and timely execution of its functions required dispensing with the hearing examiner's initial decision.

by statute or rule is insufficient if it merely recites the language of the statute or rule without finding facts or circumstances which support the ultimate finding. *American Airlines, Inc.* v. *CAB,* 235 F. 2d 845, 851 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 905 (1957); *Pan American World Airways, Inc.* v. *CAB,* 261 F. 2d 754 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 912 (1959).

A. The Commission's Purported Justification of Its Procedures as "Legislative" Action Is Insufficient.

The Communications Act empowers the Commission to determine and prescribe reasonable charges and fair practices, only "after full opportunity for hearing," 47 U.S.C. §§ 204, 205(a). The Commission, however, attempts to justify its distinct rate-making procedures with the out-dated argument that this is "legislative" action. But as this Court stated in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960), "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." See also the following cases in which this Court rejected arguments that various procedures were not required because the proceedings were "legislative": *Southern Ry.* v. *Virginia,* 290 U.S. 190 (1933); *ICC* v. *Louisville & N. R.R.,* 227 U.S. 88 (1913); *cf. Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126 (1941); *Gonzales* v. *United States,* 348 U.S. 407 (1955).

Speaking on the very question posed by the present kind of proceeding, this Court has stated:

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investi-

gation, requiring due process of law for its determination. [*Chicago, M. & St. P. Ry.* v. *Minnesota*, 134 U.S. 418, 458 (1890).]

B. The Commission's Procedures Cannot Be Justified by the Administrative Procedure Act

That the Commission's procedures in the present case are not specifically prohibited by the Administrative Procedure Act is no answer to the proposition that these procedures are basically unfair.[20] In fact, the House Committee report on the Act made it clear that in some rate cases, failure to maintain separation of functions would be unfair even though such failure might not violate the wording of the Act. After ex-

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[20] Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 1004(c)), which contains its only "separation of functions" provision, applies only to "adjudication," not to "rule making," and "rule making" is defined to include "the approval or prescription for the future of rates" (5 U.S.C. § 1001(c)). In addition, section 5(c) is specifically inapplicable to initial licensing cases and "proceedings involving the validity or application of rates."

Although the Act was intended to further "fairness" in administrative procedure, it was admittedly a "beginning," not the last word. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 48 (1946); 92 CONG. REC. 5646-63 (1946). Thus, the Senate Judiciary Committee urged that the exemptions of rule making and initial licensing cases from section 5(c) not be applied "where cases present sharply contested issues of fact" (S. REP. No. 752, 79th Cong., 1st Sess. 30 (1945)). See also 92 CONG. REC. 2159 (1946) (statement of Senator McCarran, sponsor of the bill).

In the 89th Congress just ended, the Senate Judiciary Committee stated: "Rulemaking, by its nature, is concerned with general policy matters rather than with specific and particular problems. It is legislative in character. *The application of a rule to a particular situation in the Committee's view is a matter for adjudication,* requiring evidence and proof different in nature from that justifying the formulation of the rule, itself." S. REP. No. 1234, 89th Cong., 2d Sess. 8 (1966). (Emphasis added.) (The full Senate concurred, for it passed the Bill (S. 1336) that would have made rate cases involving identified parties in specific situations subject to all adjudicatory procedures.)

plaining that initial license cases and "cases involving the validity or application of utility or carriers' rates" were exempted from the Act's separation of functions requirements, the Committee stated:

> There are, however, some instances of either kind of case which tend to be accusatory in form and involve sharply controverted factual issues, to which agencies should not apply the exceptions because *they are not to be interpreted as precluding fair procedure where it is required.* [H.R. REP. No. 1980, 79th Cong., 2d Sess. 30 (1946). (Emphasis added.)]

In accord with the intent of Congress, the courts have not hesitated to require stricter procedures than provided in the Administrative Procedure Act and similar statutes where needed for fairness. See, *e.g., Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950); *Gonzales* v. *United States,* 348 U.S. 407 (1955); *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677 (2d Cir. 1958); *Amos Treat & Co.* v. *SEC,* 306 F. 2d 260 (D.C. Cir. 1962); *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (D.C. Cir. 1959). In the *Sangamon Valley* case, the court rejected the FCC argument that ex parte communications were permissible because the proceeding was "rule making" rather than "adjudication." The court agreed instead with the Department of Justice, which stated in its brief:

> The need for fairness cannot turn on whether the label "quasi-legislative" or "quasi-judicial" be applied. The outcome of this proceeding, we emphasize, affected particular interests in a concrete, substantial way. . . . From this it seems clear that the Court's task of ensuring that an

> agency has acted "in accordance with the cherished judicial tradition embodying the basic concepts of fair play" (*Morgan* v. *United States,* 304 U.S. 1, 22) is not ended, or necessarily even aided, by attaching one or the other label to the agency proceeding under review. What is important is the substance of the proceeding and the nature of the interests involved. [Brief for the United States, p. 10.]

In short, the proscriptions of the Administrative Procedure Act[21] are not to be equated with due process. This is expressly recognized in section 12 of the Act, which declares that "nothing in this Act shall be held to diminish the constitutional rights of any person . . . ." 5 U.S.C. § 1011.[22]

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[21] Interestingly enough, the Commission relied upon the exemption of rate-making from the separation of functions provision (section 5(c)) but in doing so, it ignored not only the formal appearance of the Common Carrier Bureau as a party (J.A. 1337, Tr. 4-5, U.R. 547 (p. 6), 50-51), but also section 2(b) defining "person" as other than agencies, and "party" as "any person or agency named or admitted as a party" (5 U.S.C. § 1001(b)), as well as section 12 which expressly provides: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." 5 U.S.C. § 1011.

[22] Section 409 of the Communications Act of 1934 (47 U.S.C. § 409, App. 29a), as amended in 1952 to tighten "separation of functions" provisions in FCC "*adjudication*" proceedings only (as defined in the Administrative Procedure Act), was not cited below by the Commission or the court, but was a secondary point of reliance by the Commission in *American Tel. & Tel. Co.*, 2 F.C.C.2d 142, 145 (1965). Such statutory provision cannot legalize any procedure of the Commission which constitutes denial of due process in a "sharply controverted" rate case. The constitutional guarantee of basic fairness is, of course, no more subject to repeal or amendment by the Communications Act than by the Administrative Procedure Act.

C. The Commission's Procedures Are Unique Among Federal Rate-Making Agencies, and Have Been Uniformly Criticized By Leading Authorities

It is significant that no other federal rate-making agency functions as does the FCC. Before the Civil Aeronautics Board and the Federal Power Commission, the presiding hearing examiner normally prepares the initial decision in formal rate cases. While the Interstate Commerce Commission normally omits the hearing examiner's initial decision in cases involving suspension of proposed rates changes, it does not do so in non-suspension rate cases where a hearing is held. Even in ICC suspension cases the presiding examiner prepares for the Commission a draft of a proposed decision. The staff counsel and other personnel of each of those agencies who participate in the hearing have no part in the preparation of the initial or final decisions, and are not permitted to consult ex parte with the examiner or the agency members.[23]

In recognition of the basic defects in the FCC's rate-making procedures, leading study groups and commentators have generally condemned them. The Federal Communications Bar Association and the American Bar Association's Administrative Law Section have filed presentations with the FCC criticizing as unfair the Common Carrier Bureau's participation

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[23] See STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PROCEDURES FOR HANDLING RATE CASES IN THE CAB 11, 13-14, 34-38, 45, 51-52, 53-56, 57-58 (1962); STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE CONDUCT OF RATE PROCEEDINGS IN THE FPC 32-33, 49, 52, 56-63 (1962); STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE CONDUCT OF RATE PROCEEDINGS IN THE ICC 51-52, 65-66, 68-70 (1961).

in the decisional process in rate-making proceedings.[24] The Administrative Conference of the United States recommended that in administrative rate cases, "unless *special reasons in the particular case* require its omission, the presiding officer should prepare and publish a decision." The Conference went on to recommend that "the agency's staff . . . be required, as are other parties, to produce its evidence and state its position at an early point *and be treated in all other respects as a party.*" In particular, "off-the-record communications between the presiding examiner and members of the agency's staff who participate in the hearing *should be governed by the same principles made applicable to outside participants . . . .*" Recommendation No. 19, S. Doc. No. 24, 88th Cong., 1st Sess. 50, 51-52 (1963). (Emphasis added).[25]

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[24] See FCC Docket 15381: Comments of Federal Communications Bar Association, pp. 5-6, June 11, 1964; Comments of the Federal Communications Bar Association on Petition for Reconsideration, p. 2, Oct. 6, 1965; Comments of the American Bar Association Section on Administrative Law on Petition for Reconsideration, Mar. 18, 1966. See also 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 (Supp. 1965).

[25] The FCC has adverted to the Administrative Conference recommendation, but says that it has insufficient staff personnel to function otherwise than in its present manner. This plea of administrative economy is unavailing in light of the express rejection of the very same argument in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 46 (1950). See also *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924). Moreover, the FCC is not itself unanimous in approval of its procedures. Commissioner Loevinger vigorously opposes the path being followed by the Commission. See *American Tel. & Tel. Co.*, 2 F.C.C. 2d 142, 157 (1965), 2 F.C.C. 2d 877, 883 (1966) (dissenting opinions); *Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 F.C.C. 2d 49, 62 (1965) (dissenting opinion).

The Conference's Committee on Rulemaking published a report in support of these recommendations in which it observed that "the basic principle of fairness which underlies separation-of-functions ideas is applicable to *ex parte* consultation with participants in rate proceedings," and stated:

> Discussions with staff members participating in the case as lawyers or witnesses should be kept on the same basis as with outside participants; that is, the discussion should be limited to procedural or other matters falling within the traditional *ex parte* area or all the parties should be notified or present.[26]

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[26] S. Doc. No. 24, 88th Cong., 1st Sess. 105 (1963). The Committee Report also stated: "The basic reasons which supported the emphasis in the Administrative Procedure Act on the role of the hearing examiner in agency decisions remain important today. *Procedures which allow staff members to* conduct *ex parte* investigations, *render tentative decisions,* and then advise the agency heads with respect to the final decision *would tend to be arbitrary in fact as well as appearance.* Use of the independent hearing examiner protects against one-sided, biased, or arbitrary staff determinations and eliminates the appearance or actuality of unfairness." *Id.* at 82. (Emphasis added.)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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